Les Recueils de la Société internationale de Droit militaire et de Droit de la Guerre
sont édités à Bruxelles par la Société internationale de Droit militaire et de Droit de la Guerre
et imprimés avec l'appui financier de la Défense belge.

Direction:
Renaissancelaan 30 Avenue de la Renaissance
B 1000 - Bruxelles / Brussel

The " Recueils " of the International Society for Military Law and the Law of War
are edited in Brussels by the International Society for Military Law and the Law of War
and printed with the financial support of the Belgian Ministry of Defence.

L'INTEROPÉRABILITÉ JURIDIQUE ET LA GARANTIE DU RESPECT DU DROIT APPLICABLE DANS LE CADRE DES DÉPLOIEMENTS MULTINATIONAUX

LEGAL INTEROPERABILITY AND ENSURING OBSERVANCE OF THE LAW APPLICABLE IN MULTINATIONAL DEPLOYMENTS

Société internationale de Droit militaire et de Droit de la Guerre
International Society for Military Law and the Law of War

RECUEIL
XIX

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19e Congrès international
19th International Congress
QUÉBEC (Canada)
1 - 5 mai/May 2012

S. Horvat & M. Benatar (eds.)

RECUEILS OF THE INTERNATIONAL SOCIETY FOR MILITARY LAW AND THE LAW OF WAR

RECUEILS DE LA SOCIETE INTERNATIONALE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE

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Printing House of Defense
Rue d'Evere / Eversestraat, 1140 - Bruxelles / Brussels, Belgique / Belgium

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Textes du congrès

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Congress Proceedings

Stanislas HORVAT
Marco BENATAR
(eds.)

BRUXELLES / BRUSSELS

2013

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The Application of Human Rights Law in Peace Operations on the presentation and paper by Kjetil Mujezinović Larsen

Comments by Frederik Naert*
Member of the Legal Service of the Council of the EU, affiliated senior researcher at the KU Leuven.

I. Introduction

When I was asked to comment on Kjetil's paper and presentation at this congress, I hesitated because there are many points on which I agree with him as far as this topic is concerned. There was therefore a risk that my comments would be very short – which the audience/readers would perhaps not mind – or would be largely repetitive. To my relief, I did find some points on which I can either offer a different perspective from Kjetil's or complement or elaborate on his points.

In particular, I will briefly address the following four aspects: the impact of UN Security Council mandates; the relationship between human rights and international humanitarian law (IHL); derogation from human rights; and the regional dimension. I will finish with a few concluding remarks.

Before offering my observations on these points, I would stress that I very much agree with Kjetil's endorsement of a gradual notion of "jurisdiction" under human rights treaties,[1] as also reflected in the Human Rights Committee's opinions[2] and arguably in the recent *Al-Jedda* judgment of the European Court of Human Rights (ECtHR).[3]

II. The Impact of UN Security Council Mandates

I would agree with Kjetil that the primacy of obligations under the UN Charter laid down in Article 103 UN Charter extends not only to obligations imposed by the UN Security Council but also to authorizations

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* The views expressed are solely my own and do not bind the Council or its Legal Service. Comments can be sent to frederik.naert@law.kuleuven.be.

1 See F. Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Antwerp, Intersentia, 2010), pp. 544-567, especially pp. 557, 561 and 567 (the thesis on which this book is based, is available online at https://lirias.kuleuven.be/bitstream/1979/1986/1/Doctoraatsthesis_Frederik_Naert_08-09-2008_final.pdf). All webpages were last visited on 13 January 2013.

2 See e.g. *Ibrahim Gueye et al. v. France*, Communication No. 196/1985, 6 April 1989, CCPR/C/35/D/196/1985, §9.4.

3 *Al-Jedda v. UK*, 7 July 2011 (Application No. 27021/08). See the agora on this judgment in 50 *Military Law and the Law of War Review* 2011, pp. 315-445.

granted by the Security Council, subject to the considerations set out below.[4] Furthermore, I also consider that it extends to primacy over other obligations of States under customary international law[5] (and I think is the prevailing view[6]). I would add that for the purposes of the project, it may be necessary to examine to what extent both the binding nature of UN Security Council resolutions and the primacy rule of Article 103 apply to international organizations as such.[7]

I disagree, however, to some extent with his suggestion that the approach adopted by the ECtHR in *Al-Jedda* should be rejected and that instead, the approach adopted by the UK House of Lords in that case should be followed. In particular, I find it reasonable and sound not to assume too readily that, in its resolutions, the Security Council intended to permit or impose derogations from human rights law. In that respect, one might question whether a mere reference to "all necessary measures" can suffice to this effect. That being said, it may be open to question whether an explicit mention of derogation is necessary or whether more specific wording reflecting a clear Security Council intent should not be sufficient. In this regard, taking into account the quite specific language on security detention in the letter annexed to Resolution 1546, which was at issue in *Al-Jedda*, the ECtHR arguably went too far in interpreting the Security Council's wording and intention.[8]

As a related point, the question arises when obligations under the UN Charter conflict with and prevail over human rights treaty provisions, including those under the European Convention on Human Rights (ECHR). As indicated above, I believe such a conflict may arise in the case of

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4 See more extensively F. Naert, *supra* note 1, pp. 504-506.

5 See more extensively *id*., pp. 501-504.

6 See *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682, 13 April 2006, pp. 168-181, especially pp. 175-176.

7 In relation to the EU, see F. Naert, *supra* note 1, pp. 419-434; F. Naert, 'The Application of International Humanitarian Law and Human Rights Law in CSDP Operations', in E. Cannizzaro, P. Palchetti & R. Wessel (eds.), *International Law as Law of the European Union* (Martinus Nijhoff, 2011), pp. 193 and 207-208 and F. Naert, 'Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework of International Organisations', in J. Wouters *et al*. (Eds.), *Accountability for Human Rights Violations by International Organizations*, Antwerp: Intersentia, 2010, pp. 140-154, referring *inter alia* to the European Court of Justice's *Kadi* cases (Case C-402/05 P, *Kadi v. Council and Commission*, 3 September 2008. This judgment overturned the Court of First Instance's judgment in this case. The latter court, now renamed the (EU's) General Court, has, however, continued to express dissenting views: see Case T-85/09, *Yassin Abdullah Kadi v. Commission*, judgment 30 September 2010. The appeal against this latest judgment is pending: see joined cases C-584/10, 593/10 and 595/10.

8 See also my introductory comments to the agora (*supra* note 3), pp. 317-318.

authorizations, provided these are sufficiently clear (as just submitted). However, it must be noted that the ECtHR in *Al-Jedda* seems to have taken a more restrictive view on this matter.

III. The Relationship between Human Rights and IHL

Kjetil rightly points out that this is covered to some extent in the *Handbook of the International Law of Military Operations* and I have no major difficulties with the relevant rule formulated in that handbook (rule 4.02).

However, I believe there would be merit in providing further guidance on what it means to say that in case of collision between a human rights and an IHL norm "*the more specific norm applies in principle*".[9] This would likely be a major challenge but it is a key element on which we should at least attempt to offer some further guidance beyond stating the principle. The October 2011 ICRC report to the 31st International Conference of the Red Cross and Red Crescent provides some indications of aspects on which further guidance would be useful.[10]

In addition, in a few recent judgments, the ECtHR has clarified to some extent the relationship between the ECHR and IHL. In particular, in *Varnava* the Court stated that "Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law" (emphasis added).[11] The way in which the Court rather summarily dismisses security detention under the law of occupation in paragraph 107 of *Al-Jedda* raises the question whether it does not impose rather strict limits on the degree to which interpretation of the ECHR in the light of IHL is possible[12] and whether it will accept

[9] My own views on this relationship are set out at some length in F. Naert, *supra* note 1, pp. 589-641.

[10] *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, ICRC report to the 31st International Conference of the Red Cross and Red Crescent, October 2011, http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf, pp. 13-22.

[11] *Varnava and Others v. Turkey*, 18 September 2009 (Applications Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90), § 185.

[12] This prompts the question to what extent the Court's views might be specific to internment in occupied teritory (and by extension perhaps to internment of enemy civilans in a State's own territory in an international armed conflict). In fact, the former European Commission on Human Rights appears to have distinguished between the treatment of prisoners of war on the one hand and that of interned civilians and other military personnel on the other hand in one of its early Cyprus cases: see the Report of 10 July 1976 in *Cyprus v. Turkey*, §§ 309-313 and Part IV (Conclusions), point II.3. In particular, with regard to interned civilians, it held that Article 5 ECHR was violated (without referring to IHL on this point – see the criticism in the dissention opinion of Mr. Sperduti, joined by Mr. Trechsel in this case). By contrast, while it concluded that

the partial displacement of ECHR rights in case of conflict with rules of IHL where the *lex specialis* principle would justify this. Furthermore, the Court's findings in *Al-Skeini* clearly imply that the right to life under the ECHR continues to apply even in situations of occupation, subject only to derogation in respect of deaths resulting from lawful acts of war.[13]

A more thorough analysis of the operation of the *lex specialis* principle would probably also require a thorough analysis of the link between this question and the question of derogation under human rights treaties (see below on the latter). In this respect, there may some elements specific to the ECHR, especially on account of the fact that its provisions are often more specific and detailed than those of other human rights treaties. For instance, under the International Covenant on Civil and Political Rights (ICCPR) it is possible to interpret the provision on the right to life (article 6) through recourse to IHL.[14] By contrast, under the ECHR this requires a derogation, as indicated by the reference to lawful acts of war in article 15(2) ECHR, at least in international armed conflicts.[15] Moreover, it could be worth examining whether the applicability of IHL could imply an automatic derogation, at least in the case of international armed conflicts (and occupations).[16]

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the detention of Greek Cypriot military personnel in Turkey was also not in conformity with Article 5 ECHR, it held that it was not necessary to examine whether Article 5 had been violated by the internment of prisoners of war. It is not quite clear how it arrived at this conclusion. It stated that "The question whether any of the above deprivations of liberty, in particular the detention of military personnel as prisoners-of-war, were justified under Art. 15 of the Convention is reserved for consideration in Part III of this Report" but did not find in that part that there was any applicable derogation (§§ 525-531). Presumably, this implies that it regarded this as a matter governed by IHL on which I did not have to (or could not?) rule (the Commission also refers to Turkish assurances that it would apply IHL and to ICRC visits, but these cannot affect the legality of the detention/internment).

13 *Al-Skeini.v. UK* (Application No. 55721/07), 7 July 2011, § 162.

14 ICJ, Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, §25.

15 It should be noted that Article 2(2)c ECHR permits d*eprivation of life when it results from the use of force which is no more than absolutely necessary "in action lawfully taken for the purpose of quelling a riot or insurrection*". The question arises whether "insurrection" in this provision could cover (some) non international armed conflicts; if it does, this may open the possibility for conduct of hostility rules of IHL to be used to interpret article 2 ECHR without the need for a derogation. See also above note 12 on the 1976 report in *Cyprus v. Turkey*.

16 See F. Naert, *supra* note 1, pp. 572-575. See the dissention opinion of Mr. Sperduti, joined by Mr. Trechsel to the 1976 report in *Cyprus v. Turkey* (above note 12), §§ 5-7 ("It can be said, in accordance with the above approach, that measures which are in themselves contrary to a provision of the European Convention but which are taken legitimately under the international law applicable to an armed conflict, are to be considered as legitimate measures of derogation from the obligations flowing from

IV. Derogation from Human Rights

The main point I want to make in these comments is related to my first two points above and concerns the possibility or even the necessity to derogate from some human rights obligations. While I agree with Kjetil that this is "an unresolved legal question" and that "it may be difficult to formulate a clear rule", I do not think this is a merely theoretical discussion.

On the contrary, especially after the restrictive view on when UN Security Council resolutions permit overriding human rights obligations in *Al-Jedda* (see above), State parties to the ECHR who consider that they cannot apply some ECHR provisions in full in a peace operation in which these provisions are applicable may well need to invoke a derogation, unless they obtain a more explicit power to override these obligations from the Security Council (or unless applicable IHL rules operate as *lex specialis* and entail an automatic derogation, see above).[17] The issue is particularly relevant for detention but regrettably, it is not at all addressed in the outcome of the Copenhagen process on the Handling of Detainees in International Military Operations.[18]

That being said, this is a complex question. I will now identify some of the aspects and considerations that would in my view need to be taken into account in any rule on derogation. These will focus on the ECHR but some of them would also be relevant for the ICCPR.

- First, as Kjetil points out, States have so far not used derogations in this context. There may be various reasons for this, including States' view that they could rely on UN Security Council mandates and/or that States have in many cases not been prepared to accept the applicability of the ECHR (or ICCPR for that manner) in the first place (making a derogation would imply such acceptance). After *Al-Jedda* and *Al-Skeini*, both these reasons may no longer prevail to the same extent.

- Second, Kjetil raises the argument about whether a derogation from a State's extraterritorial human rights obligations is legally possible, since

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the Convention").

17 See also Heike Krieger's assessment in het contribution to the agora in 50 *Military Law and the Law of War Review* 2011, especially pp. 433-441.

18 For the start of this process, see Danish Ministry of Foreign Affairs, Legal Service, Copenhagen Conference on 'The Handling of Detainees in International Military Operations', 11 - 12 October 2007, *Non-Paper on Legal Framework and Aspects of Detention*, 4 October 2007 with accompanying note on the 'Copenhagen Process on The Handling of Detainees in International Military Operations', Vol. 46 *Military Law and the Law of War Review* 2007, pp. 363-392. The outcome of this process (Principles and Guidelines and the Chairman's commentary) is available at http://um.dk/da/~/media/UM/Danish-site/Documents/Politik-og-diplomati/Nyheder_udenrigspolitik/2012/Copenhangen%20Process%20Principles%20and%20Guidelines.pdf and is forthcoming in Vol. 51 *Military Law and the Law of War Review* 2012.

the derogation provisions apply only "In time of war or other public emergency threatening the life of the nation" (Article 15 ECHR)[19] Kjetil writes that this implicitly means the life "of the nation seeking to derogate" but acknowledges that there is a tendency in academic contributions and in "(vague) case law" to accept extra-territorial derogations, "on the basis that derogation will be permitted if the public emergency requirement is satisfied with regard to the host State". I am among those who believe that an extraterritorial derogation is legally possible, as well as necessary for the ability to apply the ECHR in peace operations deployed in exceptional circumstances.[20] The case for this possibility is arguably strong when the jurisdiction of a sending State[21] is based on control over territory. In that case "the life of the nation" could be said to include also that of the nation living on the territory which is under control. This would be consistent with the acceptance by the ECtHR that local emergency situations within a State can justify derogations even when they do not threaten the life of the entire nation.[22] However, even when jurisdiction is based on authority and control over a person, it could be argued, as Kjetil mentions, that a threat to the life of "the nation" on the territory could refer to the nation in the theatre of operations. Obviously, the situation in the area of operations must be such that there is indeed a threat to the life of the "local" nation. There is some support in the case law for the possibility of extraterritorial derogations. In particular, this view was explicitly endorsed by the European Commission on Human Rights.[23] More recently, in Al-Jedda, the ECtHR did not say that this would not be possible[24] and the UK Government did not want to rule this out during the proceedings before the House of Lords.[25] In addition,

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19 The corresponding wording in Article 4 ICCPR is "In time of public emergency which threatens the life of the nation".

20 See F. Naert, *supra* note 1, pp. 577-580 and 583. Compare Heike Krieger, above note 17, pp. 434-435.

21 I will briefly mention the impact of international organizations leading peace operations below.

22 See F. Naert, *supra* note 1, p. 574, especially note 2406.

23 See the 1976 report in *Cyprus v. Turkey* (above note 12), § 525: "... the Commission found that the Turkish armed forces in Cyprus brought any other persons or property there "within the jurisdiction" of Turkey, in the sense of Art. 1 of the Convention, "to the extent that they exercise control over such persons or property" [...]. It follows that, to the same extent, Turkey was the High Contracting Party competent ratione loci for any measures of derogation under Art. 15 of the Convention affecting persons or property in the north of Cyprus".

24 See § 100 ("The Government do not contend that the detention was justified under any of the exceptions set out in subparagraphs (a) to (f) of Article 5 § 1, nor did they purport to derogate under Article 15").

25 House of Lords, *Al-Jedda, R (on the application of) v Secretary of State for Defence*, 12 December 2007, [2007] UKHL 58, http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071212/jedda.pdf,§ 38. By contrast, several law lords expressed doubts on whether this would be possible (see *id*., §§ 38, 132 and 150).

while the ECtHR in Bankovic stated that "the Court does not find any basis upon which to accept the … suggestion that Article 15 covers all "war" and "public emergency" situations generally, whether obtaining inside or outside the territory of the Contracting State",[26] one can also turn around the Court's statement in that same case that "Article 15 itself is to be read subject to the " jurisdiction" limitation enumerated in Article 1" (§ 62) to argue that where Article 1 does apply extraterritorially, Article 15 may also do so.

- The latter argument brings us to a key policy argument: once it is accepted that a human rights treaty applies extraterritorially, including in situations that undoubtedly qualify as emergency situations, the impossibility to derogate would lead to an unrealistic and unworkable situation in which States would be required to apply the human rights treaty in full in circumstances in which that is impossible. This may be more pronounced for the ECHR because of its more detailed provisions (see also above).

- It is likely, as Kjetil writes, that the political costs of derogations may make it an unlikely option, at least so far. However, these costs would have to be weighed against the risk of having to apply human rights provisions in full, possibly resulting in greater risk to deployed forces and a reduced ability to address security threats. In addition, there are a number of arguments that could well reduce these perceived political costs. In particular, derogations are not contrary to human rights but are precisely the mechanism which human rights instruments provide to deal with emergencies. Furthermore, it seems that States do not face these political costs, or do so only to a lesser extent, when they are in fact derogating but without formally invoking the derogation provisions (in particular on the basis of an alleged Security Council authorization to do so). This seems somewhat hypocrite and calls into question whether the political costs would indeed be so significant. I would add here that see no conflict between primacy of an obligation or authorization under the UN Charter on the one hand (see above), and the use of derogations in accordance with applicable procedural rules for derogations under human rights treaties. In particular, I do not see why a State relying on a UN Security Council obligation or authorization to in fact derogate from a human rights treaty provision should not follow the procedure for such derogations.

- Perhaps the main challenge would be that a power to derogate by individual sending States might lead to different appreciations by different participating States, and in relation to the host State authorities. However, attempts could be made to overcome or limit divergences

[26] Grand Chamber decision as to the admissibility of Application No. 52207/99 by *Vlastimir and Borka Bankovic and others v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, 12 December 2001, § 62.

through coordination. The question may also arise whether an international organization in charge of a peace operation, which might have its own human rights obligations, could derogate.[27]

Furthermore, if a derogation were to be invoked, the next question would be to what extent the derogation would be permissible. In particular, as regards detention, the question would arise what procedural safeguards would have to be put in place as a minimum.[28]

V. The Regional Dimension

While human rights are regarded as universal, it is a fact that in the field of human rights, regional instruments play an important role and that there are some differences in the material scope of some human rights (see e.g. the level of detail in some ECHR provisions already referred to above, combined with the extensive case-law of the ECtHR).

This raises the question whether the human rights obligations of a troop contributing nation/sending State under a regional human rights treaty (should) always apply in full to its forces when operating in a third State outside that region. There may be a tension in this respect between avoiding double standards and not imposing regional standards on a State from another region. In a situation of occupation, there is the additional element of the restrictions on the power of occupation forces to change the legal framework in force in the occupied territory (Article 43 Hague Regulations and Article 64 Geneva Convention IV).

This regional dimension may also increase the divergences between the obligations of troop contributing nations/sending States from different regions which operate jointly in the same operation.

Finally, it may even affect the impact of UN Security Council resolutions (see above).

VI. Concluding Remarks

I am convinced that Kjetil's paper provides a good starting point for the work on the application of human rights in peace operations in the framework of the Society's research project. Nevertheless, this topic is a very complex and controversial one and will most certainly require

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[27] Since international organizations are almost never a party to human rights treaties, the question is mostly theoretical. However, it could arise once the EU has acceded to the ECHR (this is being negotiated). The question of the possibility to derogate under the Charter of Fundamental Rights of the European Union (*Official Journal of the European Union* C 83, 30 March 2010, p. 389), which has the same status as the EU Treaties, would also need to be examined in this context.

[28] This point was quite rightly raised by Baroness Hale in the House of Lord judgment in *Al-Jedda* (above note 25), §§ 126-129, albeit in relation to the extent of the derogation under Resolution 1546. See also Lord Carswell's views in that judgment (§§ 130 and 136).

significant further research and discussion. I hope that my comments may contribute to that endeavour.

It is essential to try to develop a common approach to this issue resulting in a pragmatic outcome, i.e. one which is realistic and feasible in practice, but which also fully respects the applicable law. Lawyers and policy-makers owe it to the military to provide them with a legal framework for peace operations that is as clear as possible and meets the operational requirements.

It is my firm conviction that practitioners and States should take the initiative to develop such an approach and put forward a workable position solidly grounded in the applicable law, rather than take a defensive position leading to a piecemeal and reluctant acceptance of the application of human rights in peace operations on terms essentially determined by (international and regional) courts and human rights bodies.

Observance of International Humanitarian Law by Forces under the Command of the European Union

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* The views expressed are solely those of the author and do not bind the Council or its Legal Service.

I. Introduction

In this contribution, I will identify the main issues relevant for the observance of international humanitarian law (IHL) by forces participating in military operations under the command of the European Union (EU) and I will describe the EU's practice and policy in this respect.

As the EU is a relatively new actor in the military field, I will first explain what kinds of military operations the EU can conduct and the implications thereof for the applicable law (II) and will provide an outline of the overall legal framework for these operations, as well as their planning, command and control and conduct (III). I will then briefly address attribution, responsibility and remedies (IV). In section V, I will examine the core aspect of this contribution, namely the applicability and application of IHL in EU military operations. Since, as I will explain below, IHL is usually not applicable to these operations, I will also cover the applicability and application of human rights in EU military operations (VI). I will conclude with some final remarks (VII).

While the focus will be on the EU, I will also cover to some extent a wider European perspective, in particular as regards human rights.

II. The Nature of EU Military Operations and the Implications for Applicable Law

Under Article 42(1) of the Treaty on European Union (TEU[1]), the EU's Common Security and Defence Policy (CSDP)[2] "shall provide the Union with an operational capacity drawing on civil and military assets. The Union may use them on missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter". These missions are

[1] I refer to the version of the TEU after the entry into force of the Treaty of Lisbon. The consolidated text of the TEU is published in the *Official Journal of the European Union* (*OJ*) C 326, 26 October 2012, available online at http://eur-lex.europa.eu/en/treaties/index.htm.

[2] On the CSDP (previously named the European Security and Defence Policy (ESDP)), see generally http://www.consilium.europa.eu/eeas/security-defence?lang=en and G. Grevi, D. Helly & D. Keohane (eds.), *European Security and Defence Policy: the First Ten Years (1999-2009)* (Paris, EU Institute for Security Studies, 2009), http://www.iss.europa.eu/uploads/media/ESDP_10-web.pdf. For a more extensive analysis of the CSDP from a legal perspective, see e.g. F. Naert, *International Law Aspects of the EU's Security and Defence Policy, with a Particular Focus on the Law of Armed Conflict and Human Rights* (Antwerp, Intersentia, 2010; the thesis on which this book is based, is available online at https://lirias.kuleuven.be/bitstream/1979/1986/1/Doctoraatsthesis_Frederik_Naert_08-09-2008_final.pdf); S. Blockmans (ed.), *The European Union and International Crisis Management: Legal and Policy Aspects* (The Hague, TMC Asser Press, 2008) and M. Trybus & N. White (eds.), *European Security Law* (Oxford, Oxford University Press, 2007). All webpages were last visited in February 2013.

further defined in Article 43 TEU: they "shall include joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation" and may "contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories". In addition, the TEU now includes a mutual assistance clause in Article 42(7) TEU but this is not further addressed here.[3]

CSDP missions, including EU military operations, may therefore vary greatly in nature, ranging from consensual rule of law, police, security sector reform, training, border assistance or monitoring missions, to peacekeeping and potentially even peace enforcement, and they can be tailored to the specific situation. This wide range of missions and operations has consequences in terms of the applicable law.

In particular, although the contrary is sometimes argued, "tasks of combat forces in crisis management, including peacemaking" cover peace enforcement and hence potentially high intensity operations involving combat.[4] Such tasks may be subject to IHL (see below).

However, most CSDP operations[5] do not involve combat (or occupation) and therefore IHL is likely to be applicable only in few CSDP operations. Indeed, a majority (about two-thirds) of CSDP operations have been civilian rather than military missions. Furthermore, the EU military operations have included training missions, an anti-piracy operation, and several operations closer to peacekeeping than to peace enforcement.

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3 This provision states that "If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter. This shall not prejudice the specific character of the security and defence policy of certain Member States" and that "Commitments and cooperation in this area shall be consistent with commitments under the North Atlantic Treaty Organisation, which, for those States which are members of it, remains the foundation of their collective defence and the forum for its implementation" (emphasis added). However, it would seem that it is not intended that this clause be implemented through EU actions (see Naert, *supra* note 2, pp. 225-233). By contrast, the 'solidarity clause' in Article 222 TFEU clearly does require implementation by the Union and not only by its Member States.

4 See Naert, *supra* note 2, pp. 197-206 and F. Naert, 'ESDP in Practice: Increasingly Varied and Ambitious EU Security and Defence Operations', in Trybus & White (eds.), *supra* note 2, pp. 95-96. In the preamble of the Protocol (to the TEU after the Treaty of Lisbon) on permanent structured cooperation, it is recognized that the EU may be called upon by the UN to assist in implementation of missions undertaken under Chapter VI or VII of the UN Charter (emphasis added).

5 On these missions, see http://www.consilium.europa.eu/eeas/security-defence/eu-operations?lang=en; Naert, *supra* note 3, pp. 61-101 and Naert, *supra* note 2, pp. 97-191.

EU policy, discussed in greater detail below, is therefore that IHL does not necessarily apply in all EU military operations as a matter of law nor is it necessarily considered the most appropriate standard as a matter of policy in all EU military operations. For this reason, I will also examine the application of human rights.

III. The Legal Framework, Planning, Command and Control, and Conduct of EU operations

Before addressing the applicability and application of IHL in EU military operations, it is necessary to briefly describe the overall legal framework for these operations (under EU law and international law) and to explain how they are planned and conducted, including in terms of command and control.

1. The Legal Framework[6]

Under EU law, the basic legal instrument governing each EU operation is a Council decision, adopted on the basis of Articles 42(4) and 43 TEU (see above) and in accordance with the voting rules laid down in Article 31 TEU[7]. These decisions correspond to the joint actions that were adopted pursuant to Article 14 pre-Lisbon TEU.

It is important to note that these acts are acts of the Union and not merely decisions adopted collectively by the Member States.[8] Furthermore, although the TEU does not define the legal effect of decisions adopted under the Common Foreign and Security Policy, including the CSDP, in as much detail as it does for other EU acts (such as regulations and directives), Article 28(2) TEU does provide that decisions on operational action by the Union in the Common Foreign and Security Policy "shall

6 See generally F. Naert, 'Legal Aspects of EU Operations', Vol. 15 *Journal of International Peacekeeping* 2011, pp. 218-242.

7 I.e. by unanimity but with the possibility of abstentions. Pursuant to Article 31(1), second subparagraph, a member of the Council may qualify its abstention by making a formal declaration. In that case, "it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position". The members of the Council qualifying their abstention in this way may not represent at least one third of the Member States comprising at least one third of the population of the Union. For operations not having military or defence implications, in some cases where there is a prior European Council decision or request, the voting rule would be qualified majority.

8 In the framework of the EU, such collective decisions of the Member States also exist but they are explicitly identified as decisions of the (representatives of the Governments of the) Member States (meeting within the Council), as opposed to *Council* Decisions. See e.g. Decision 2011/327/EU of the Representatives of the Governments of the Member States of 1 June 2011 on the handling of documents of EU civilian crisis management missions and military operations and repealing Decision 2008/836, *OJ L* 147, 2 June 2011, p. 20.

commit the Member States in the positions they adopt and in the conduct of their activity". In some cases, the Council joint action or decision setting up an operation has set out the mandate and tasks of a mission in some detail. In particular, the Council Joint Action setting up the counter-piracy operation Atalanta specifically authorizes the use of force, arrest, detention and transfer of suspected pirates and armed robbers at sea, as well as the transmission of personal data.[9] Some Member States considered this necessary for their forces participating in the operation to be enabled to conduct these tasks. Council decisions establishing CSDP operations are published in the *Official Journal* (as are nearly all SOFAs/SOMAs and participation agreements (see below)).[10]

Such Council decisions (and joint actions) generally *inter alia* set out the mission and mandate, political and military control and direction, designate the commanders and headquarters, specify the command and control relations and contain provisions on the status of the mission, financial arrangements, participation of third States (i.e. non-EU Member States), relations with other actors, handling of EU classified information and on the launching and termination/duration of the operation.

In military operations, the Council usually adopts a further separate decision launching the operation, together with the approval of the Operation Plan and, where applicable, the Rules of Engagement.[11]

The Political and Security Committee (PSC) is invariably authorised to take a number of decisions (see Article 38 TEU), including decisions to amend the planning documents, including the Operation Plan, the Chain of Command and the Rules of Engagement, and decisions on the appointment of the EU Operation and Force Commander, while the powers of decision with respect to the objectives and termination of the operation remain vested in the Council.

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9 See Article 2 of Council Joint Action 2008/851/CFSP of 10 November 2008, *OJ L 301, 12 November 2008, p. 33 (corrigendum OJ L* 253, 25 September 2009, p. 18) (this acts has subsequently been amended on several occasions*).* See more extensively F. Naert & G.-J. Van Hegelsom, 'Of Green Grass and Blue Waters: A Few Words on the Legal Instruments in the EU's Counter-Piracy Operation Atalanta', Issue 25 *NATO Legal Gazette*, 5 May 2011, pp. 2-10 (available at http://www.ismllw.org/Nato%20Legal%20 Gazette.php and as KU Leuven Institute for International Law Working Paper No 149 at http://www.law.kuleuven.be/iir/eng/research/wp.html).

10 Furthermore, many other documents relating to CSDP operations are also in the public domain. See the CSDP websites referred to above (*supra* notes 2 and 5) and the public register of Council documents at http://www.consilium.europa.eu/documents/access-to-council-documents-public-register?lang=en (unless stated otherwise, Council documents referred to below by number are available to the public in this register).

11 For an example, see Council Decision 2008/918/CFSP of 8 December 2008 on the launch of a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Atalanta), *OJ L* 330, 9 December 2008, p. 19.

The TEU accords an important role to international law in EU external relations. This was reinforced under the Treaty of Lisbon, in particular in Articles 3(5) and 21(1) and (2)b-c TEU: in its external relations, the Union shall contribute to "the protection of human rights, …, as well as to the strict observance and the development of international law, including respect for the principles of the [UN] Charter"; its actions on the international scene shall be guided by "democracy, the rule of law, … human rights and fundamental freedoms, respect for human dignity, …, and respect for the principles of the [UN] Charter and international law" and its actions and policies shall aim to "consolidate and support democracy, the rule of law, human rights and the principles of international law" and to "preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the [UN] Charter […]".[12]

Several international law aspects are relevant to EU military operations. First, there is the question of the legal basis under international law for such operations. The most common bases in international law for CSDP Operations are a UN Security Council resolution, host State government consent (which is the rule in civilian operations) and/or a peace agreement (there may be combinations of these legal bases). There may be further bases such as the law of the sea in operation Atalanta, the counter-piracy operation off the Somali coast.[13]

Second, there is the question of the international law applicable to the conduct of such operations. This is addressed below in sections V and VI as regards IHL and human rights.[14]

Third, on the basis of Articles 37 TEU and 218 Treaty of the Functioning of the European Union (TFEU),[15] the EU can conclude international agreements relating to its crisis management operations. These agreements

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[12] See F. Naert, 'The Application of International Humanitarian Law and Human Rights Law in CSDP Operations', in E. Cannizzaro, P. Palchetti & R. Wessel (eds.), *International Law as Law of the European Union* (Leiden, Martinus Nijhoff, 2011), pp. 189-212, especially p. 193, and this book more generally. See also F. Naert, 'Legal Framework Governing the Protection and Promotion of Human Rights in EU Missions - Application of EU Law Principles and Instruments', in A. Sari & R. Wessel (eds.), *Human Rights in EU Crisis Management Operations: A Duty to Respect and to Protect?*, Centre for the Law of EU External Relations, Working Paper 2012/6, The Hague, CLEER / T.M.C. Asser Institute, 2012, pp. 39-49, http://www.asser.nl/upload/documents/20121221T112600-CLEER%20Working%20Paper.pdf and this publication more generally.

[13] This is combined with a series of UN Security Council resolutions and notifications by Somalia as regards the territory and territorial waters of Somalia, as well as the consent of some other States in the region.

[14] Moreover, other rules of international law may be relevant, e.g. the law of the sea in maritime operations such as Atalanta.

[15] Article 24 TEU prior to the entry into force of the Treaty of Lisbon.

are concluded by the EU as a separate legal person[16] and not collectively by the Member States.[17] They are binding on the institutions of the Union and on its Member States.[18] Such agreements are frequently concluded and include especially agreements on the participation of third States and status of forces/mission agreements.[19]

The EU will normally conclude a Status of Forces/Mission Agreement (SOFA/SOMA) with the host State which will regulate the status and activities of an operation in the host State. A SOFA/SOMA typically contains, amongst others, provisions on the wearing of uniforms and carrying of arms, the exercise of criminal jurisdiction, privileges and immunities of the operation and its personnel, security of the mission and its personnel, handling of claims, implementing arrangements and the settling of disputes.[20] There is a model SOFA and a model SOMA for EU missions.[21] There may also be alternative status arrangements.[22]

When a third State participates in an EU military operation (this happens in most of these operations), the modalities of its participation are usually laid down in a participation agreement with the EU. Such agreements may

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16 Prior to the Treaty of Lisbon, some doubts may still have persisted as regards the *Union*'s (as opposed to the European *Community's*) legal personality. Notwithstanding these doubts, in the light of the Union's extensive treaty practice pre-dating the Treaty of Lisbon, it is clear that the Union already possessed international legal personality. This was acknowledged in the notification to third States relating to the succession of the EC by the EU. The model for this notification inter alia provides that "… the European Union will exercise all rights and assume all obligations of the European Community *whilst continuing to exercise existing rights and assume obligations of the European Union*. In particular, as from that date all agreements between (…) and the …/*European Union*, and all commitments made by the …/*European Union* to (…) and made by (…) to the …/*European Union*, will be assumed by the European Union" (Draft notification to third parties before the entry into force of the Treaty of Lisbon, EU Council Doc. 16654/1/09 of 27 November 2009, emphasis added). In any event, the Treaty of Lisbon has settled the matter: pursuant to Article 47 EU Treaty, '[t]he Union shall have legal personality' and this clearly includes international legal personality.

17 E.g., Article 2(1) of the Agreement between the International Criminal Court and the European Union on cooperation and assistance, *OJ L* 115, 28 April 2006, p. 50, explicitly defines the EU as distinct from its Member States.

18 Article 216(2) TFEU.

19 See also A. Sari, 'The Conclusion of International Agreements by the European Union in the Context of the ESDP', Vol. 56 *ICLQ* 2007, pp. 53-86 and P. Koutrakos 'International Agreements in the Area of the EU'S Common Security and Defence Policy', in Cannizzaro, Palchetti & Wessel, *supra* note 12, pp. 157-187.

20 See A. Sari, 'Status of Forces and Status of Mission Agreements under the ESDP: the EU's Evolving Practice', Vol. 19 *EJIL* 2008, pp. 67-100.

21 See on the one hand EU Council Documents 12616/07 of 6 September 2007 and 11894/07 of 20 July 2007 and COR 1 (5 September 2007) and on the other hand EU Council Doc. 17141/08 of 15 December 2008.

22 See Naert, *supra* note 6, p. 231.

be concluded on an ad hoc basis for a given operation[23] (on the basis of a model agreement) or may take the form of a framework agreement covering the participation in EU operations generally.[24] In participation agreements the participating State normally associates itself with the joint action/ Council decision establishing an operation, commits itself to providing a contribution and bears (some of) the costs thereof. Such agreements also *inter alia* provide that the personnel of the third State participating in the operation are covered by any SOFA/SOMA concluded by the EU, contain provisions on the (transfer of) command and control, jurisdiction and claims (via declarations on waivers of claims) and safeguard the EU's decision-making autonomy.

There are also likely to be additional agreements/arrangements, often memoranda of understanding and technical arrangements, between participating States dealing with various aspects of their cooperation within an EU operation.

2. Planning, Command and Control and Conduct[25]

The key decision-making body in the CSDP is the Council (of Ministers of the European Union). The work of the Council is prepared by a series of preparatory bodies (composed of Member States' representatives) and by the High Representative of the Union for Foreign Affairs and Security Policy (Baroness Ashton), who is assisted by the European External Action Service.[26] The Council preparatory bodies include the Political and Security Committee,[27] the EU Military Committee (with its Working Group)

[23] For an example, see the Agreement between the European Union and the Republic of Croatia on the participation of the Republic of Croatia in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta), *OJ L* 202, 4 August 2009, p. 84.

[24] See e.g. Framework Agreement between the United States of America and the European Union on the participation of the United States of America in European Union crisis management operations, 17 May 2011, *OJ L 143, 31 May 2011, p. 2;* Agreement between the European Union and the Republic of Moldova establishing a framework for the participation of the Republic of Moldova in European Union crisis management operations, 13 December 2012, *OJ L 8, 12 January 2013, p. 2* and Agreement between the European Union and Ukraine establishing a framework for the participation of Ukraine in the European Union crisis management operations, 13 June 2005, *OJ L* 182, 13 July 2005, p. 29. The number of such agreements is increasing.

[25] This section draws significantly on F. Naert, 'The Application of Human Rights and International Humanitarian Law in Drafting EU Missions' Mandates and Rules of Engagement', in M. Aznar & M. Costas (eds.), *The Integration of the Human Rights Component and International Humanitarian Law in Peacekeeping Missions Led by the European Union* (CEDRI/ATLAS, 2011), pp. 61-71; available online as KU Leuven Institute for International Law Working Paper No 151 at http://www.law.kuleuven.be/iir/eng/research/wp.html.

[26] See especially Article 27 post-Lisbon EU Treaty. See also *infra* note 33.

[27] See generally Council Decision 2001/78/CFSP of 22 January 2001 setting up the

(EUMC),[28] the Political-Military Group (PMG) and the Committee for Civilian Aspects of Crisis Management (CIVCOM).[29] Within the European External Action Service, key players include the Crisis Management and Planning Directorate,[30] as well as the EU Military Staff (EUMS),[31] the Civilian Planning and Conduct Capability (CPCC[32]), the EU Intelligence Analysis Centre (INTCEN, previously the EU Situation Centre) and the Directorate Crisis Response and Operational Coordination.[33]

The Political and Security Committee plays a crucial role. By virtue of Article 38 TEU, it exercises, under the responsibility of the Council and of the High Representative, "political control and strategic direction" of EU operations and can be delegated some decision-making powers (see above).

The planning and decision-making process involves the planners/experts and the politicians/diplomats, with key decisions being taken by the Council itself (i.e. Ministers). Furthermore, once an Operation Commander has been appointed, he/she also plays a key role in the planning process. The 'crisis management procedures', which describe this process, have been detailed in a document entitled 'Suggestions for procedures for coherent, comprehensive EU crisis management'.[34] However, while these procedures

Political and Security Committee, *OJ L* 27, 30 January 2001, p. 1.

28 See generally Council Decision 2001/79/CFSP of 22 January 2001 setting up the Military Committee of the European Union, *OJ L* 27, 30 January 2001, p. 4 and http://www.consilium.europa.eu/eeas/security-defence/csdp-structures-and-instruments/eu-military-committee-(eumc)?lang=en. On the EUMC and CIVCOM, see also M.K. Davis Cross, *Cooperation by Committee* (Paris, EU Institute for Security Studies, 2010, Occasional Paper 82), http://www.iss.europa.eu/uploads/media/op82_CooperationbyCommittee.pdf.

29 See generally Council Decision 2000/354/CFSP of 22 May 2000 setting up a Committee for Civilian Aspects of Crisis Management, *OJ L* 127, 27 May 2000, p. 1.

30 See http://www.consilium.europa.eu/eeas/security-defence/csdp-structures-and-instruments/cmpd?lang=en.

31 See generally Council Decision 2001/80/CFSP of 22 January 2001 on the establishment of the Military Staff of the European Union, *OJ L* 27, 30 January 2001, p. 7, as amended by Council Decision 2005/395/CFSP of 10 May 2005, *OJ L 132, 26 May 2005, p. 17* and Council Decision 2008/298/CFSP of 7 April 2008, *OJ L* 102, 12 April 2008, p. **25,** and http://www.consilium.europa.eu/eeas/security-defence/csdp-structures-and-instruments/eu-military-staff?lang=en. These acts now have to be read together with the Council Decision on the EEAS (*infra* note 33).

32 See http://www.consilium.europa.eu/eeas/security-defence/csdp-structures-and-instruments/cpcc?lang=en.

33 See Council Decision 2010/427/EU of 26 July 2010 Establishing the Organisation and Functioning of the European External Action Service, *OJ L* 201, 3 August 2010, p. 30, especially Articles 4(3)a and 7(1) and the Annex. See generally http://eeas.europa.eu and the organisation chart available there.

34 EU Council Doc. 11127/03 of 3 of July 2003. See also the EU Concept for Military Planning at the Political and Strategic Level, EU Council Doc. 10687/08 of 16 June 2008. For a brief discussion, see Grevi, 'ESDP Institutions', in Grevi, Helly & Keohane

are in practice generally fairly closely adhered to, they are flexible and only provide guidelines.[35] They are currently being reviewed.

In essence,[36] these procedures provide for the development of four planning documents (which are normally classified documents), each of which is submitted to PSC and then to the Council,[37] after having been examined by the relevant preparatory bodies (usually the EUMC, CIVCOM and/or the PMG), which issue advice or recommendations or may amend the documents.[38] For military operations, these documents are:

- a *Crisis Management Concept*, which is "a conceptual framework describing the EU's overall approach to the management of a particular crisis, addressing the full range of activities" (p. 45, note 13);
- *Military Strategic Options*, which should *inter alia* include an assessment of feasibility and risk, a Command and Control structure and force capability/personnel requirements (see §§ 39-47, pp. 13-15);
- a *Concept of Operations* (CONOPS), normally developed by the Operation Commander; this normally includes guidelines on the use of force;
- an *Operation Plan* (OPLAN),[39] normally developed by the Operation Commander; the OPLAN contains the specifics of the operation and is often rather long, in part due to many annexes, which normally *inter alia* address legal issues and the use of force;

In military operations in which the use of force is authorized (beyond self-defence[40]), there are also *Rules of Engagement* (ROE) requested by the

(eds.), *supra* note 2, pp. 53-59.

35 EU Council Doc. 11127/03, p. iii.

36 Some phases/documents have been omitted here, e.g. the military strategic options directive and the initiating military directive. In addition, as the document dates from 2003, it does not reflect more recent institutional developments. For military operations, see also the 'planning snake' at p. 11 of EU Council Doc. 10687/08, *supra* note 34.

37 Via the Committee of Permanent Representatives (COREPER), unless the written procedure is used.

38 On the civilian side, CIVCOM may amend planning documents, whereas on the military side this is rarely done (although Member States' comments may be sought on a draft planning document before it is formally submitted).

39 In the case of some coordinating actions or training missions, the planning documents may be named differently, e.g. 'Mission Plan' instead of OPLAN.

40 E.g., in the training mission EUTM Somalia, no ROE have been issued so far. It should be pointed out that in EU and NATO practice, (individual – as opposed to inter-State) self-defence broadly speaking means defence against an actual or imminent attack against oneself or one's colleagues and possibly third persons (the precise scope depends on applicable domestic law). Other instances of the use of force, e.g. to detain suspected criminals or to accomplish certain tasks, are covered by rules of engagement (ROE) that are considered to be distinct from self-defence (although there may be some overlap).

Operation Commander and authorized by the Council,[41] together with the OPLAN and based on the EU's policy and doctrine on the use of force.[42]

These operation-specific planning documents take into account generic CSDP documents, including a series of concepts.[43] They are not legal instruments and are developed in parallel with the legal instruments mentioned above.

In terms of command and control, it is important to note that the EU has a few small standing military structures/bodies (especially the EUMS and the EUMC (see above), as well as the European Defence Agency[44]) but does not have a standing military headquarters structure capable of planning and conducting operations. Therefore a distinct chain of command has to be agreed and generated for each EU military operation. In addition,

For a more elaborate discussion, see H. Boddens-Hosang, 'Force Protection, Unit Self-defence, and Extended Self-defence' and 'Personal Self-defence and Its Relationship to Rules of Engagement', in T. Gill & D. Fleck (eds.), *The Handbook of the International Law of Military Operations* (Oxford, Oxford University Press, 2010), respectively pp. 415-427 and 429-443 and H. Boddens Hosang, 'Self-Defence in Military Operations: The Interaction between the Legal Bases for Military Self-Defence and Rules of Engagement', Vol. 47 *Military Law and the Law of War Review* 2008, pp. 25-96. By contrast, in UN language, self-defence in an extended sense may include the use of force for mission accomplishment. See on the use of force in UN operations, T. Findlay, *The Use of Force in UN Peace Operations* (Oxford, Oxford University Press, 2002); S. Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building* (Oxford, Oxford University Press, 2004), pp. 99-125, especially pp. 103-106 and R. Zacklin, 'The Use of Force in Peacekeeping Operations', in N. Blokker & N. Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality: A Need for Change?* (Leiden, Nijhoff, 2005), pp. 91-106.

41 Subsequent amendments may be adopted by the PSC within its delegated powers.

42 The EU's policy and doctrine in this field is set out in the Concept for the Use of Force in EU-led Military Operations (currently second revision, EU Council Doc. 17168/09 of 4 December 2009, EU RESTREINT, declassified to a very limited extent in EU Council Doc. 17168/09 EXT 1 of 2 February 2010; the previous version (first revision) is EU Council Doc. 6877/06 of 28 February 2006, EU RESTREINT, declassified to a very limited extent in EU Council Doc. 6877/06 EXT 1 of 31 March 2010). Paragraphs 3 and 4 of the 2009 concept (pp. 6-7) respectively state that "The purpose of this paper is to define the framework and principles for the use of force by military units and individuals in EU-led military operations. It also aims to serve as a reference document for defining principles of use of force, including ROE, for any EU-led military contribution to other military operations" and that "This Use of Force concept describes the overall approach to the use of force and its legal framework, sets out the EU procedures for requesting, authorising and implementing ROE, and presents a compendium of ROE in Annex A".

43 E.g. the EU Concept for Logistic Support for EU-led Military Operations (EU Council Doc. 10963/08 of 19 June 2008); the EU Concept for Reception, Staging, Onward Movement & Integration (RSOM&I) for EU-led Military Operations (EU Council Doc. 10971/08 of 19 June 2008) and the EU Concept for Strategic Movement and Transportation for EU-led Military Operations (EU Council Doc. 10967/08 of 19 June 2008). See also the other concepts referred to elsewhere in this text.

44 See http://www.eda.europa.eu/.

a force generation process takes place to generate the required forces to be provided by Member States (and, where applicable, by third States participating in an operation).[45]

The highest level of military command in EU military operations[46] rests with the Operation Commander. The Operational Headquarters (OHQ) assisting the Operation Commander may be made available by a Member State, by NATO under the Berlin plus arrangements,[47] or may consist of the EU Operations Centre, which then has to be activated.[48] The Operation Commander will normally receive operational control over forces put at his disposal by the participating States via a transfer of authority.[49] The next command level, the highest one in the field, is the Force Commander.

As the issue of command and control is important and sometimes misunderstood, it merits a few remarks here. First, the fact that 'full command' is retained by participating States[50] does not mean that EU Commanders have no command or control. Rather, through the transfer of

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45 See EU Concept for Force Generation, EU Council Doc. 10690/08 of 16 June 2008.

46 For the command and control arrangements in civilian CSDP operations, see Council Doc. 9919/07 EXT 2 (1 February 2008; this is a partially declassified version). There is a permanent Civilian Operation Commander, who, as a rule, exercises command and control of all civilian operations at the strategic level, supported by the CPCC, while the Head of Mission exercises command and control at theatre level.

47 On EU-NATO relations regarding EU missions, see F. Naert, 'EU Crisis Management Operations and Their Relations with NATO Operations', in Z. Hegedüs, D. Palmer-DeGreve & S.L. Bumgardner (eds.), *NATO Legal Deskbook* (2010, 2nd ed.), pp. 281-300.

48 The EU Operations Centre was activated for the first time in relation to an operation in 2012. See Council Decision 2012/173/CFSP of 23 March 2012 on the activation of the EU Operations Centre for the Common Security and Defence Policy missions and operation in the Horn of Africa, *OJ L 89, 27 March 2012, p. 66. However, this was not in a command role (see Article 1(2) of this decision) but in a supporting role (see Article 2 of this decision), including support for operational planning and conduct for the civilian regional maritime capacity building mission EUCAP Nestor (see http://www.consilium.europa.eu/eeas/security-defence/eu-operations/eucap-nestor) and a more limited role in relation to Atalanta. See also http://www.consilium.europa.eu/eeas/security-defence/csdp-structures-and-instruments/eu-operations-centre?lang=en.*

49 For the command and control arrangements in military CSDP operations, see EU Concept for Military Command and Control, Council Doc. 10688/08 REV 3 of 13 September 2012 (now declassified; the date of the original document is 16 June 2008), especially pp. 7-8, 13-14 and 25-26 (incl. definitions of the different kinds of command and control). In this document, Operational Control (OPCON) is defined as "The authority granted to a commander to direct forces assigned, so that the commander may accomplish specific missions or tasks which are usually limited by function, time or location; to deploy units concerned and to retain or assign tactical control of those units. It does not include authority to assign separate employment of components of the units concerned. Neither does it of itself, include administrative or logistic responsibility" (p. 25).

50 Council Doc. 10688/08 REV 3, p. 25, states that full command "covers every aspect of military operations and administration and exists only within national services".

authority certain aspects of this command and control are transferred to the EU Operation Commander. Indeed, when participating States want to regain *complete* command and control, they issue a reverse transfer of authority to bring their forces back under their complete command and control. This has for instance occurred on several occasions in the context of operation Atalanta (it is relatively easy to carry out in relation to ships as these are easily separable units). Such reverse transfers of authority would not be necessary if participating States did keep complete command and control. Second, it is sometimes said that in the context of the EU (and NATO), less command and control is transferred to the organisation/operation/Commander than in the case of UN operations. This is not correct.[51] Third, the issue of command and control must be distinguished from the question of criminal and disciplinary jurisdiction over individual soldiers/staff. The fact that participating States have criminal and disciplinary jurisdiction over their soldiers/staff deployed in an EU operation,[52] does not mean in any way that these soldiers/staff are not under the command and control of the Operation Commander.[53]

As mentioned above, the PSC exercises, under the responsibility of the Council and of the High Representative, 'political control and strategic direction' of EU operations. Since the Council and PSC are composed of representatives of all EU Member States and decide unanimously on these matters (see above), this is how Member States can exercise control.[54] This is one of the points on which there is a significant difference with the UN, where the Security Council plays the key role but has a more limited membership - hence the discussions in the UN on ways of better involving troop contributing countries. However, it should be stressed that this

[51] Section 7 of the Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to the United Nations Peace-keeping Operation (UN Doc. A/46/185, 23 May 1991, Annex), provides that 'During the period of their assignment to [the UN operation], the personnel made available by [the Participating State] shall remain in their national service but shall be under the command of the [UN] …. Accordingly, the [UN Secretary-General] shall have full authority over the deployment, organization, conduct and direction of [UN operation], including the personnel made available by [the Participating State]'. However, in practice States certainly do not cede more than operational command to the UN. See Cammaert & Klappe, 'Authority, Command, and Control in United Nations-led Peace Operations', in Gill & Fleck (eds.), *supra* note 40, pp. 159-162.

[52] For an articulation in relation to a third State participating in an EU operation, see e.g. Article 3(3)-(4) of the Framework Participation Agreement between the EU and Ukraine (*supra* note 24). For an example in a civilian EU mission, see Articles 8(6) and 10(2) Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, OJ 2008 L 42/92.

[53] This is the same in the framework of UN operations.

[54] It should be noted that the execution of a task may be entrusted, within the EU framework, to a group of Member States which are willing and have the necessary capability for such a task (Articles 42(5) and 44 TEU). This has not yet been used and is not further discussed here.

relates to *political* control and *strategic direction* and does not constitute interference with the military chain of command.

IV. Attribution, Responsibility and Remedies

As in the case of operations under the command of other international organizations, such as the UN, NATO, or the AU, in respect of EU military operations the question arises as to who is responsible for any violations of the law which might be committed in the course of such operations[55] and what remedies are available. I cannot elaborate on this issue here and the scope of this contribution only permits a summary identification of some EU specificities.[56]First, in relation to attribution, several of the elements set out above concerning decision making, chain of command, transfer of authority, etc., may be relevant and I will not repeat those here (see also below, section V.5).

Second, the EU has a specific system of remedies with a role for Member State courts given the lack of jurisdiction of the European Court of Justice in relation to the CSDP.[57]

Third, the EU has no immunity from *jurisdiction* before the courts of its Member States, except where the European Court of Justice (ECJ) has jurisdiction.[58]

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[55] See generally the ILC's 2011 Draft Articles on the Responsibility of International Organisations (ILC, *Report of the Sixty-third session*, UN Doc. A/66/10, pp. 52-172), Articles 6 and 7 and associated commentaries. Compare ECtHR *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* (Grand Chamber, 31 May 2007 (admissibility)) with *Al-Jedda v. UK* (Grand Chamber, 7 July 2011) and with the recent Dutch cases *M. M.-M., D.M and A.M. (Mustafić) and H.N. (Hasan Nuhanović) versus the State of the Netherlands*, Court of Appeals The Hague, case nos 200.020.173/01 and 200.020.174/01, judgments of 5 July 2011 (English translations available at http://jure.nl/br5386 and http://jure.nl/br5388). See also the agora in 50 *Mil L L War Rev* 2011, pp. 315-445 and K.M. Larsen, *Human Rights Treaty Obligations of Peacekeepers* (Cambridge, Cambridge University Press, 2012).

[56] See more extensively Naert, *supra* note 2, pp. 355-357, 435-449, 506-526 and 641-646; F. Naert, 'The International Responsibility of the Union in the Context of Its CSDP Operations', forthcoming in P. Koutrakos & M. Evans (eds.), *The International Responsibility of the European Union* (Hart, 2013); G Marhic, 'Violations of Human Rights and International Humanitarian Law in the Context of Missions: Assessing the Responsibility of the European Union', in Aznar & Costas (eds.), *supra* note 25, pp. 111-118 and A. Sari and R.A. Wessel, 'International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime', in B. Van Vooren, S. Blockmans and J. Wouters (eds.), *The Legal Dimension of Global Governance: What Role for the EU?* (Oxford University Press, 2013; draft available at http://www.utwente.nl/mb/pa/research/wessel/wessel88.pdf).

[57] See Articles 275 *juncto* 340 and 19(1) TFEU.

[58] Pursuant to Article 343 TFEU the Union shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks,

Fourth, like many other organizations, the EU usually sets up specific claims arrangements in its operations as part of status of forces/mission agreements, which also contain provisions on jurisdiction and immunities.[59]

Fifth, there is an Agreement *between the Member States* of the EU to regulate the status of their forces and personnel within each other's territory (EU SOFA),[60] which has not yet entered into force. This is complemented by an Agreement between the Member States of the EU concerning claims introduced between them in the context of an EU crisis management operation,[61] which has not yet entered into force either. A declaration in relation to this agreement states that: "In signing this Agreement, all Member States will endeavour, insofar as their internal legal system enables them, to limit as far as possible their claims against any other Member State for injury, death of military or civilian personnel, or damage to any assets owned, used or operated by themselves, except in cases of gross negligence or wilful misconduct".

Sixth, a number of other legal instruments relating to EU military operations, including participation agreements, contain specific provisions regarding responsibility.[62]

Seventh, concerning human rights, once the EU will have acceded to the European Convention on Human Rights (ECHR) (see below), the question of attribution will become much less important[63] as regards remedies[64] since the European Court of Human Rights will then be competent irrespective of whether the EU or the participating Member States are responsible for conduct in an EU military operation.[65]

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under the conditions laid down in the Protocol (No. 7) on the privileges and immunities of the EU. This Protocol does not grant the EU immunity from *jurisdiction* before the courts of its Member States (as opposed to its property and assets being exempt from any measure of constraint without the authorization of the ECJ). Article 274 TFEU adds that "Save where jurisdiction is conferred on the [ECJ] by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States".

59 See Naert, *supra* note 56 and A. Sari, 'Status of Forces and Status of Mission Agreements under the ESDP: the EU's Evolving Practice', Vol. 19 *EJIL* 2008, pp. 67-100.

60 16 November 2003, *OJ C* 321, 31 December 2003, p. 6. See extensively A Sari, 'The EU Status of Forces Agreement: Continuity and Change in the Law of Visiting Forces', Vol. 46(1-2) *Mil L L War Rev* 2007, pp. 9-253.

61 28 April 2004, *OJ C 116, 30 April 2004, p. 1.*

62 See Naert, *supra* note 56.

63 Assuming the CSDP will not be excluded from the EU's accession to the ECHR.

64 As will be argued below, in terms of substantive human rights obligations there is already a significant convergence between the relevant human rights obligations of the EU (under EU law) and those of its Member States (under EU and international law).

65 It should be added that the question of Member State responsibility is wider than that of attribution, see F. Naert, 'Binding International Organisations to Member State Treaties or Responsibility of Member States for Their Own Actions in the Framework

Finally, it would seem that very few issues of responsibility have actually arisen in practice.[66] After ten years of operations that is rather remarkable. However, this means it is difficult to provide an overall assessment of the EU's arrangements on responsibility in its military operations. On the one hand, this may indicate that the law is generally well respected in the conduct of these operations and/or that the arrangements put in place work well. On the other hand, as a consequence, these arrangements have perhaps not yet really been tested, neither in court nor in more conflictual cases. Also, a number of issues may not yet have come to the fore. As long as this situation remains as it is, the current system is not likely to change significantly and such changes do not seem to be necessary at present.

V. Applicability and Application of International Humanitarian Law[67]

In this section, I will first set out the EU's policy and practice as regards the applicability and application of IHL in EU military operations (1). I will then examine a European perspective on the relationship between IHL and human rights (2). Next, I will analyse the convergence of Member States' IHL obligations (3) and the policy options and mechanisms which the EU has at its disposal to deal with divergences (4). I will conclude with an example of an EU commitment in the field of IHL, namely the Montreux Document on Private Military and Security Companies (5).

1. EU Policy on the Applicability of IHL

International humanitarian law - or the *ius in bello* or the law of armed conflict[68] - only applies to situations of armed conflict and occupation. The EU and its Member States accept that if EU-led forces become a party to an armed conflict, IHL will fully apply to them. In the context of the EU, this was *inter alia* reflected in the Salamanca Presidency Declaration,

of International Organisations', in J. Wouters, E. Brems, S. Smis & P. Schmitt (eds.), *Accountability for Human Rights Violations by International Organizations* (Antwerp, Intersentia, 2010), pp 129-168.

66 As one exception, the question of attribution and responsibility was addressed in Germany in a judgment of the Cologne administrative court of 11 November 2011 (available in German at http://www.justiz.nrw.de/nrwe/ovgs/vg_koeln/j2011/25_K_4280_09urteil20111111.html). The court ruled that Germany was responsible for the transfer of suspected pirates held on board a German ship participating in the EU's operation Atalanta to Kenya on the basis of Germany's role in this transfer. The reasoning of the court is very narrow and the judgment is under appeal.

67 This section draws significantly on F. Naert, 'Challenges in Applying International Humanitarian Law in Crisis Management Operations Conducted by the EU', in A.-S. Millet-Devalle (ed.), L*'Union européenne et le droit international humanitaire* (Paris, Pedone, 2010), pp. 139-150. See also generally on this topic this book edited by A.-S. Millet-Devalle; Naert, *supra* note 2, pp. 463-540 and M. Zwanenburg, 'Toward a More Mature ESDP: Responsibility for Violations of International Humanitarian Law by EU Crisis Management Operations', in Blockmans (ed.), *supra* note 2, pp. 395-416.

68 I use these terms interchangeably even though they are sometimes distinguished.

which provided that "Respect for International Humanitarian Law is relevant in EU-led operations when the situation they are operating in constitutes an armed conflict to which the forces are party".[69] This position is consistent with the scope of application of IHL itself and corresponds to that reflected in Article 2(2) of the 1994 Convention on the Safety of United Nations and Associated Personnel[70] and, to some extent, in the UN Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law.[71]

However, given that only some EU operations might involve the use of armed force *as a party to an armed conflict*, IHL is likely to be applicable only in few EU operations. EU policy is accordingly that IHL does not necessarily apply in all EU operations nor is it necessarily considered the most appropriate standard as a matter of policy in all EU military operations.

In fact, so far, EU-led forces have not become engaged in combat as a party to an armed conflict in any of the EU's military operations. While IHL could have become applicable if the situation would have escalated in some of these operations, especially Artemis (in the DRC) and EUFOR Tchad/RCA, this did not happen.[72]

Nevertheless, even when IHL does not apply to EU-led forces, it may be relevant for the relations between the parties to the conflict. Moreover, the EU and its Member States remain fully aware of the potential obligations of EU-led forces under IHL, in particular when the situation escalates.

The EU legal instruments relating to EU missions have not referred to IHL so far, except in two case where status agreements for non-EU missions which did refer to IHL were made applicable to an EU mission, namely for the AMIS Supporting Mission via the African Union SOMA and for EUFOR DR Congo via the MONUC SOFA.[73]

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69 The outcome of the international humanitarian law European seminar of 22-24 April 2002 in Salamanca, Doc. DIH/Rev.01.Corr1 (on file with the author).

70 New York, 9 December 1994, 2051 *U.N.T.S.* 391.

71 UN Doc. ST/SGB/1999/13, 6 August 1999, available online at http://www.icrc.org/eng/resources/documents/misc/57jq7l.htm. Section 1.1 provides that "The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants". However, the bulletin then adds "to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence". This addition is problematic because the mere fact that the use of force in self-defence is *permitted* obviously cannot entail the applicability of IHL. Moreover, even if force is used in self-defence, IHL will only apply when the force used crosses the threshold of an armed conflict. E.g., when an EUFOR soldier is attacked by criminals for personal profit and uses force in self-defence, this is clearly not regulated by IHL.

72 See Naert, *supra* note 67, pp. 142-143.

73 See respectively section 8a Status of Mission Agreement (SOMA) on the Establishment

2. A European/EU Perspective on the Relationship between IHL and Human Rights

The space available here only allows for mentioning the key features of the ECtHR's jurisprudence on IHL, as well as a brief EU perspective.[74]

In 1976, there was an interesting but arguably inconsistent finding of the European Commission of Human Rights regarding civilian internees and detained military personnel without prisoner of war status on the one hand (breach of the ECHR without examining IHL) and prisoners of war on the other hand (governed by IHL and no examination on the substance under the ECHR) in one of the early Cyprus cases.[75]

This was followed by a period of silence on IHL with the exception of a few isolated cases in which there may have been an implicit application of IHL in cases where the result would most likely have been the same under both IHL and human rights law (and marked by ignoring IHL altogether in relation to Northern Cyprus). This includes the rulings in several Chechnya cases on the basis of strict human rights standards.[76]

It is only in recent years that the ECtHR has started to explicitly refer to IHL. Two cases in particular merit some attention.

First, in *Varnava and Others v. Turkey* (18 September 2009, § 185), the Court ruled that

> Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of [IHL] which play an indispensable and universally-accepted role in mitigating the savagery and

and Management of the Ceasefire Commission in the Darfur area of Sudan (CFC) (Khartoum, 4 June 2004, http://www.issafrica.org/AF/profiles/Sudan/darfur/soma.pdf), made applicable by an exchange of letters between the (EU Council) Secretary-General/ High Representative and the President of the African Union Commission (see Council Joint Action 2005/557/CFSP of 18 July 2005 on the European Union civilian-military supporting action to the African Union mission in the Darfur region of Sudan, *OJ L 188, 20 July 2*005, p. *46,* 15th consideration of the preamble and Article 12), and Article 6(a) Agreement between the United Nations and the Democratic Republic of the Congo on the status of the United Nations Mission in the Democratic Republic of the Congo (Kinshasa, 4 May 2000, French version on file with the author), made applicable by UN Security Council Resolution 1671 (25 April 2006), § 12.

74 See more extensively Naert, *supra* note 2, pp 607-615. Compare ICJ, Advisory Opinion on the *Legal consequences of the construction of a wall in the occupied Palestinian territory*, 9 July 2004, §§ 105-106 and Human Rights Committee, General Comment 31 (21 April 2004, CCPR/C/74/CRP.4/Rev.6), § 11.

75 *Cyprus v. Turkey*, Report of 10 July 1976, §§ 309-313 and §§ 525-531 (derogation) and Part IV (Conclusions), point II.3. Note the criticism in the dissenting opinion, especially §§ 6-7.

76 E.g. the judgments of 24 February 2005 in *Isayeva*,*Yusupova and Bazayeva v. Russia* and *Isayeva v. Russia*.

> inhumanity of armed conflict […]. The Court therefore concurs … that in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities …. (emphasis added).

Second, in *Al-Jedda v. UK* (7 July 2011, § 107), the Court stated that

> … the Court does not find it established that [IHL] places an obligation on an Occupying Power to use indefinite internment without trial. Article 43 of the Hague Regulations requires an Occupying Power to take "all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country" (…). While the International Court of Justice in its judgment Armed Activities on the Territory of the Congo interpreted this obligation to include the duty to protect the inhabitants of the occupied territory from violence, including violence by third parties, it did not rule that this placed an obligation on the Occupying Power to use internment; indeed, it also found that Uganda, as an Occupying Power, was under a duty to secure respect for the applicable rules of international human rights law … (…). In the Court's view it would appear from the provisions of the Fourth Geneva Convention that under [IHL] internment is to be viewed not as an obligation on the Occupying Power but as a measure of last resort (see paragraph 43 above).[77]

This suggests that the ECtHR is willing to take into account IHL, but only to some extent. The Court will probably have to elaborate its views on the relationship between IHL and human rights in more detail in some of the Georgia cases.[78]

In any event, a number of questions currently remain open. For instance, can the applicability of IHL, at least in the case of international armed conflicts, entail an automatic derogation under the ECHR? And can the exception to the right to life for death resulting from the use of force strictly necessary "in action lawfully taken for the purpose of quelling a riot or insurrection" (emphasis added) in Art. 2(2)c ECHR be a basis to look to conduct of hostilities rules under IHL applicable in non-international armed conflicts even in the absence of a derogation?

As regards the EU, in 2005 it adopted the EU Guidelines on promoting compliance with IHL. These guidelines, which were updated in 2009, provide in § 12 that

> It is important to distinguish between international human rights law and IHL. They are distinct bodies of law and, while both are principally aimed

[77] On this judgment, see the agora in Vol. 50 *Mil L L War Rev* 2011, pp. 315-445.

[78] On 13 December 2011, the ECtHR declared admissible the case of *Georgia v. Russia* (II) (Appl. No. 38263/08), relating to the armed conflict between Georgia and Russia in August 2008.

> at protecting individuals, there are important differences between them. In particular, IHL is applicable in time of armed conflict and occupation. Conversely, human rights law is applicable to everyone within the jurisdiction of the State concerned in time of peace as well as in time of armed conflict. Thus while distinct, the two sets of rules may both be applicable to a particular situation and it is therefore sometimes necessary to consider the relationship between them.[79]

This implies recognition of the potential concurrent application of IHL and human rights. The European (Union) view appears to recognize the *lex specialis* principle but as a principle to be applied on a case-by-case basis,[80] e.g. leaving room for a possible distinction between international and non-international armed conflicts on issues such as detention.

3. Convergence of Member States' IHL Obligations

It is well known that Member States of international organizations, including the EU, have different treaty obligations in the field of IHL, which complicates the conduct of operations under the command of international organizations and gives rise to problems of 'legal interoperability'.[81]

However, the importance of such divergences is limited by the fact that a significant body of IHL rules has become part of customary international humanitarian law.[82] Furthermore, there is a marked convergence between

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79 *OJ C* 303, 15 December 2009, p. 12.

80 Compare International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, finalized by M. Koskenniemi*, UN Doc. A/CN.4/L.682, 13 April 2006, pp. 168-181, especially pp. 175-176.

81 See, e.g. M. Zwanenburg, 'Legal Interoperability in Multinational Forces: A Military Necessity', in College of Europe & ICRC (eds.), *Proceedings of the Bruges Colloquium. Current Challenges to the Law of Occupation. 20th – 21st October 2005 / Actes du colloque de Bruges. Les défis contemporains au droit de l'occupation. 20-21 octobre 2005* (Bruges, College of Europe, 2006), *Collegium* No. 34, http://www.coleurope.eu/content/publications/pdf/Collegium%2034.pdf, pp. 108-115, especially pp. 110-115, and the various contributions in A.E. Wall (ed.), *Legal and Ethical Issues of NATO's Kosovo Campaign*, 78 International Law Studies 2002 (Newport, US Naval War College), pp. 313-395. For a specific example, see G. Walsh, 'Interoperability of United States and Canadian Armed Forces', Vol. 15 *Duke J.I.C.L.* 2005, pp. 315-331, especially pp. 324-331 and K. Watkin, 'Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killings', Vol. 15 *Duke J.I.C.L.* 2005, pp. 281-314. Article 21(3) of the Convention on Cluster Munitions (adopted in Dublin on 30 May 2008 and signed on 3 December 2008) specifically addresses the matter of joint operations by State parties and non State parties. However, this is an exception and most treaties do not (explicitly) address this.

82 See especially J.-M. Henckaerts & L. Doswald-Beck (eds.), *Customary International Humanitarian Law* (Cambridge, Cambridge University Press, 2005, 2 Volumes) and http://www.icrc.org/customary-ihl/eng/docs/home as well as the reactions this study has evoked, e.g. by the US (see the initial US response to the study, in 89 No. 866

EU Member States' treaty obligations relating to IHL. All 27 EU Member States are parties to the 1949 Geneva Conventions, the two 1977 Additional Protocols and the Statute of the International Criminal Court,[83] as well as to the 1980 Convention on Certain Conventional Weapons[84] and the 1993 Chemical Weapons Convention.[85] There is therefore greater convergence within the EU than within NATO.[86]

Yet even within the EU, if one looks at the full range of IHL treaties, there are still some divergences.[87] Also, reservations entail differences even where treaties are ratified by all EU Member States, as do different interpretations of obligations which Member States have in common.

4. EU Policy Options and Mechanisms to Deal with Divergences

In order to address how the EU can address such divergences when they occur, it is necessary to first briefly explain how IHL and human rights are applied in the planning for and decision-making on EU military operations.

From the early stages of the planning process described above, legal issues are taken into account and are reflected in the various planning documents. The relevant legal considerations become more detailed and specific as the plans become more detailed and concrete and the planning and decision-

IRRC (2007), pp. 443-471). See also E. Wilmshurst & S. Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge, Cambridge University Press, 2007) and **P. Tavernier & J.-M. Henckaerts (eds.)**, *Droit international humanitaire coutumier: enjeux et défis contemporains* (Brussels, Bruylant, 2008).

83 The Czech Republic was the last Member State to become a party to the ICC Statute. It deposited its instrument of ratification on 21 July 2009. The EU is a strong supporter of the ICC. In 2006, it concluded a cooperation agreement with the ICC (*OJ L* 115, 28 April 2006, p. 50) and it has a common position in support of the ICC (currently Council Decision 2011/168/CFSP of 21 March 2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP**,** *OJ L 76, 22 March 2011, p. 56*). See also generally http://www.consilium.europa.eu/policies/foreign-policy/international-criminal-court?lang=en.

84 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980.

85 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Paris, 13 January 1993.

86 For instance, not all Allies are a party to the 1977 Additional Protocols and the ICC Statute.

87 E.g. Poland is not a party to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Oslo, 18 September 1997) and Finland only became a party thereto in 2012; and Ireland and Malta are not a party to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954). Also, several Member States are not a party to the Convention on Cluster Munitions (adopted in Dublin on 30 May 2008 and signed on 3 December 2008).

making process proceeds towards the establishing and launching of an operation. Thus, while a Crisis Management Concept will only contain brief legal considerations, an OPLAN will contain much more detailed and specific guidance on legal issues. For military operations, an OPLAN usually contains a specific annex dealing with legal issues as well as an annex on the use of force. The latter is closely connected to the Rules of Engagement, which are normally promulgated together with the OPLAN.

As regards the use of force, the EU's policy explicitly requires respect for international law and political guidance based on military and legal advice. First, the authorisation of, and guidance on, the use of force in such operations must be given by the competent political authorities on the basis of military and legal advice. This authorisation and guidance is an essential part of the political guidance and strategic direction over EU-led military operations, which is exercised by the PSC under the authority of the Council and the High Representative. Second, all use of force in EU-led military operations - in self-defence and under the Rules of Engagement (ROE) - must always be in conformity with international standards, especially international law.[88]

In addition, a number of legal aspects will be dealt with in legal instruments relating to the mission rather than, or in addition to, the planning documents (see the overview above). The Council Working Party of Foreign Relations Counsellors (RELEX) is particularly involved in the scrutiny and drafting of those legal instruments.

Once an operation is launched, legal considerations may furthermore be reflected in implementing documents, such as standard operating procedures (e.g. in relation to detention or the handling of evidence in case of arrest of suspected criminals, including pirates). As regards the ROE, the Operation Commander decides to what extent he implements the authorised ROE, i.e. which ROE (from among those authorised) he passes down to his subordinate commanders. He may retain certain ROE at his level.

At the level of the Union, legal expertise in this field is available within the Council's General Secretariat, in particular in the Council Legal Service, as well as in the European External Action Service, including in its Legal Affairs Division. In addition, when Member States consider the approval or adoption of the relevant documents, presumably their staffing process involves their legal services.[89]

In addition, depending on their scale and nature, the EU missions may have their own legal advisors/experts. E.g., in executive EU military operations, there are usually two legal advisors in the Operational Headquarters as well

[88] EU Council Doc. 17168/09 EXT 1 of 2 February 2010, *supra* note 42, p. 6, §§ 1-2.

[89] When I worked as a legal advisor in the Belgian Ministry of Defence/Defence Staff, this was certainly the case for any OPLAN and ROE for military operations.

as one or more legal advisors at the level of the Force Headquarters and below. Due to the importance of legal issues in operation Atalanta, there are even three legal advisors in the Operational Headquarters.

Specifically with regard to IHL and human rights law, an assessment must be made for each operation whether or not either or both branches of international law are, or may become, applicable to the mission as a matter of law and/or should be applied as a matter of policy. In addition, it may be relevant to determine the obligations of the parties in theatre, e.g. in order to report on violations of international law.

In some cases, this analysis is relatively simple. E.g., it is clear that none of the EU civilian missions launched so far amounted to an occupation or participation in an armed conflict. Similarly, IHL clearly does not apply to the EU's counter-piracy activities in its operation EUNAVFOR Somalia/ Atalanta.[90]

However, in some cases the assessment is more complex. For instance, in the case of a military mission in a theatre where an armed conflict is ongoing a robust mandate may lead to the EU forces becoming engaged in combat and becoming a party to the conflict, even if this is not intended. This risk was for instance present in EUFOR Tchad/RCA. In such a case, the planning documents and especially the ROE should be flexible enough to address the scenario of such an escalation. There are various ways to achieve this flexibility, including defining the circumstances that will trigger more offensive/robust ROE combined with retaining such ROE at the level of the Operation Commander. Alternatively (or in addition), the Operation Commander may request additional or amended ROE as a matter of urgency. The PSC, which is usually delegated the power to amend the ROE within certain limits (see above), and if necessary the Council,[91] should be able to decide on such a request quickly.

Difficulties may arise when Member States have different views on the qualification of a situation/mission and/or the applicable law.[92] Fortunately,

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[90] Admittedly, UN Security Council Resolution 1851 (16 December 2008) provides in its § 6 that any measures undertaken pursuant to the authority of that paragraph "shall be undertaken consistent with applicable international humanitarian and human rights law". However, as is explained below, the word 'applicable' leaves open whether IHL does in fact apply.

[91] Through a written procedure or, if need be, at a specially convened Council meeting.

[92] E.g. whether the threshold of an armed conflict has been crossed or whether a conflict has an international or non-international character. On the latter, see e.g. in respect of multinational operations the ICRC's report *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, October 2011, Official working document of the 31st International Conference of the Red Cross and Red Crescent (31IC/11/5.1.2), http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf, pp. 10 and 31. See with regard to the EU, Naert, *supra* note 2, p. 535.

there are a number of factors that limit such disagreements, or at least their impact when they occur despite the convergence in IHL obligations described above.

First, policy choices may overcome different legal obligations or interpretations of obligations. For instance, Finland accepted that its forces would not use anti-personnel mines in EU military operations even though Finland had no IHL treaty obligation to this effect prior to 2012. Such a policy choice may minimize legal discussions. E.g., if it is decided to apply human rights standards without specifying whether this is a legal obligation or a policy choice, those taking the view these standards apply as a matter of law may be satisfied because they will effectively be applied and those who may not be willing to accept that they apply as a matter of law may be willing to accept that they are applied as a matter of policy without necessarily reflecting a recognition of a legal obligation. Such policy choices may be made on an *ad hoc* basis for a given mission or may be reflected in horizontal policy or conceptual documents.[93]

Second, the combination of a common OPLAN and ROE with national caveats which Member States may issue also allows for interoperability while ensuring respect for each Member State's obligations/position. Indeed, Member States may issue caveats applicable to their contingents but these may only impose further *restrictions* on the use of force authorized in the ROE or on tasks included in the OPLAN. The use of caveats permits Member States to ensure that their forces can respect any political or legal restrictions that are particular to a given Member State[94] without imposing these restrictions on the other Member States. Therefore, while caveats complicate life for commanders, they are often the best solution to take into account the different positions of Member States.

Ideally, the OPLAN should clarify as much as possible the applicable law, including by specifying whether IHL and/or human rights law applies. However, this is not always the case, possibly in part to retain some flexibility when the situation may evolve. The absence of such a determination may be reflected in references to 'applicable' rules of IHL or human rights law, which does not clarify whether/when/which of those rules actually are applicable and means that an Operation Commander may have to determine the applicable rules to some extent, with the assistance of legal advice at his/her level.

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93 For an example of the latter, see EU Council Doc. 17168/09 EXT 1 of 2 February 2010, *supra* note 42. When this document was discussed in the EU Military Committee's Working Group, that body was reinforced with (legal and other) experts on use of force issues.

94 For instance resulting from a Member State's domestic law (the OPLAN and ROE cannot require a Member State's forces to do something contrary to their national law) or specific treaty obligations (or interpretations thereof).

5. An EU Commitment: the Montreux Document on Private Military and Security Companies

Obligations in the field of IHL in EU military operations seem to be primarily conceived as resting on the participating States, at least so far. Thus the Presidency Conclusions of the 19-20 June 2003 Thessaloniki European Council stated that "The European Council stresses the importance of national armed forces observing applicable humanitarian law" (§ 74; emphasis added).[95] This is also reflected in the Salamanca Presidency Declaration, which stated that "The responsibility for complying with International Humanitarian Law, in cases where it applies, in a European Union led-operation, rests primarily with the State to which the troops belong", though adding that "In exercising the strategic direction and political control, the European Union will ensure that all relevant rules of international law, including humanitarian law as appropriate are duly taken into account".[96]This is also the case for NATO, although some NATO Member States have on occasion invoked the responsibility of NATO rather than their individual responsibility before international courts, but obviously at a time when it was convenient for them to do so.[97]

This view is often linked to the obligation under Article 1 common to the 1949 Geneva Conventions to "respect and to ensure respect for the present Convention in all circumstances". This obligation, reaffirmed in Article 1(1) of Additional Protocol I, is also widely considered to be part of customary international law[98] and also appears to be applicable in non-international armed conflicts.[99]

However, the argument can be made that when operations are led by international organizations, these organisations may also have their own IHL obligations, in particular under customary IHL.[100] In fact, the question

95 These conclusions are available at http://www.european-council.europa.eu/council-meetings/conclusions?lang=en.

96 *Supra* note 69.

97 See Naert, *supra* note 2, pp. 312-313 and 510-513 and compare more extensively M. Zwanenburg, *Accountability of Peace Support Operations* (Leiden, Martinus Nijhoff, 2005), especially Chapter 2.

98 In the *Nicaragua* case (*Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 27 June 1986 (Merits)), § 220, the ICJ considered that the obligation "in the terms of Article I of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances" … does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression". The Institute of International Law sees this as a basis for affirming that this obligation "has acquired the status of an obligation of customary international law": see its Resolution concerning 'The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties', adopted at the 1999 Berlin session, 7th recital of the preamble.

99 See the ICRC study, *supra* note 82, p. 495.

100 In relation to the EU, see Naert, *supra* note 2, especially pp. 515-537; Naert, *supra* note

who the parties are to a conflict involving multinational operations is one of the topics currently being examined by the ICRC.[101]

In any event, the EU has started to make commitments in the field of IHL. For instance, in addition to its guidelines on promoting respect for IHL (by others),[102] it has in particular made pledges at recent International Conferences of the Red Cross and Red Crescent.[103]

Furthermore, in what is an interesting development, the EU has signed up to the Montreux Document on Private Military and Security Companies.[104]

VI. Applicability and Application of Human Rights Law[105]

The applicability of human rights in international military operations has become a key issue over the course of the last ten years or so. In the space available here, I can only mention the main relevant aspects for multinational military operations generally and briefly address some specificities regarding EU military operations.

12 (2011), pp. 198-205 and Zwanenburg, *supra* note 67, pp. 400-406 and 412-415.

101 See e.g. the ICRC's report *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, October 2011, Official working document of the 31st International Conference of the Red Cross and Red Crescent (31IC/11/5.1.2), http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf, pp. 30-33, especially p. 32.

102 *Supra* note 79.

103 See e.g. Pledge P091 concerning 'Fundamental Procedural and other Guarantees' made by the EU Member States at the 30th International Conference (http://www.icrc.org/applic/p130e.nsf/pbk/PCOE-79CKFC?openDocument&section=PBP; the text contains commitments by the EU and by its Member States) and Pledges P1311 (http://www.icrc.org/appweb/p31e.nsf/pledge.xsp?action=openDocument&documentId=8C4228A07F5F0D5BC125795800472590), 1318 (http://www.icrc.org/appweb/p31e.nsf/pledge.xsp?action=openDocument&documentId=3BE33EEFA5A88696C12579580049E102) and 1319 (http://www.icrc.org/appweb/p31e.nsf/pledge.xsp?action=openDocument&documentId=42BAF1CDD0AEFDDEC1257958004C0140) made at the 31st International Conference (these all contain commitments by the EU and by its Member States; the EU was an observer at this conference).

104 See http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html and the conclusions of the Foreign Affairs Council meeting of 27 February 2012 on the EU priorities at the UN Human Rights Council, § 13 (http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/EN/foraff/128226.pdf, p. 19).

105 This section draws significantly on F. Naert, 'Accountability for Violations of Human Rights Law by EU Forces', in Blockmans (ed.), *supra* note 2, pp. 375-393 and F. Naert, 'Applicability/Application of Human Rights Law to International Organisations Involved in Peace Operations – a European/EU Perspective', in S. Kolanowski et al. (eds.), *Proceedings of the Bruges Colloquium. International Organisations' Involvement in Peace Operations: Applicable Legal Framework and the Issue of Responsibility. 12th Bruges Colloquium, 20-21 October 2011 / Actes du colloque de Bruges. L'implication des organizations internationales dans les missions de paix: le cadre juridique applicable et la question de la responsabilité. 12éme Colloque de Bruges, 20-21 octobre 2011* (Bruges, ICRC & College of Europe, 2012), pp. 45-56, http://www.coleurope.eu/sites/default/files/uploads/page/collegium_42_0.pdf.

The principle general aspects, which I will not address further, are the question of the extraterritorial scope of application of international human rights obligations, the impact of UN Security Council Resolutions,[106] the question of the possible recourse to "extraterritorial derogations" in this context,[107] and the relationship between IHL and human rights when both apply (see above on the latter).[108] On these issues, I refer to the contribution by Kjetil Larsen and my response thereto in the framework of the research project of the Society on a *Manual of International Law in Peace Operations*[109] elsewhere in these proceedings.

I will now briefly set out three specificities concerning human rights and EU military operations: the EU's own human rights obligations (1), the EU's accession to the ECHR (2) and the EU's policy and practice concerning respect for human rights in its military operations (3).

1. The EU's Own Human Rights Obligations

In addition to all EU Member States being bound by their (domestic and international) human rights obligations, including especially the ECHR,[110]

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106 By virtue of Article 103 of the UN Charter, obligations under the UN Charter prevail over other international agreements. See generally UN Doc. A/CN.4/L.682, *supra* note 80, pp. 168-181, especially pp. 175-176. Where UN Security Council resolutions authorize the use of all necessary means, a number of States have invoked this as a basis for partially limiting or setting aside some human rights in peace operations. However, in *Al-Jedda* (*supra* note 55), the ECtHR rejected this in relation to a Security Council mandate which did not explicitly include mention a derogation: the Court ruled that "…it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law" (§ 102) and did not accept that that was the case in the case at hand.

107 This question has become more pressing in the wake of the *Al-Jedda* judgment (see the preceding note). In particular, it would appear that under the ECHR any derogation will require either an explicit UN Security Council derogation or a formal derogation by participating States under the ECHR.

108 See generally Naert, *supra* note 2, pp. 544-567; J. Cerone, 'Human Dignity in the Line of Fire: The Application of International Human Rights Law during Armed Conflict, Occupation, and Peace Operations', 39 *Vanderbilt J.T.L.* 2006, pp. 1447-1510; F. Coomans & T. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties* (Antwerp, Intersentia, 2004); M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (Antwerp, Intersentia, 2009); K.M. Larsen, *The Human Rights Treaty Obligations of Peacekeepers* (Cambridge, Cambridge University Press, 2012) and M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford, Oxford University Press, 2011). For the most recent leading ECHR cases, see *Al-Jedda v. UK* and *Al-Skeini v. UK*, both 7 July 2011; see the agora in Vol. 50 *Mil L L War Rev* 2011, pp. 315-445.

109 See http://www.ismllw.org/Project.php.

110 The European Convention on Human Rights is undoubtedly the primary European human rights instrument. Its provisions are often more detailed and specific than those of other human rights treaties (such as the International Covenant on Civil and Political Rights), e.g. in relation to the right to life and deprivation of liberty. Also, States Parties

there are specific human rights obligations in the framework of the EU,[111] some of which are relevant for our purposes.

In particular, as opposed to most international organizations, the EU itself has extensive human rights obligations, including treaty-based ones. These obligations are especially laid down in Article 6 TEU and in the EU's Charter of Fundamental Rights,[112] which has same value as the EU Treaties.

Pursuant to Article 6(1) TEU, the EU "recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties" and pursuant to Article 6(3) TEU, "[f]undamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law". In addition, Article 6(2) TEU provides that the EU shall accede to the ECHR (see below).

Articles 3(5) and 21 EU Treaty reinforce these human rights obligations in relation to the EU's external relations. They provide that in its external relations, the Union shall contribute to "the protection of human rights, …, as well as to the strict observance and the development of international law"; that its actions on the international scene shall be guided by "democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, … and respect for the principles of … international law" and that its actions and policies shall aim to "consolidate and support democracy, the rule of law, human rights and the principles of international law" (see also above, section III.1).

Moreover, the European Court of Justice has essentially elevated EU human rights rules to the highest norms of primary EU law.[113]

Furthermore, these EU human rights rules bind not only the EU itself but also its Member States when they are implementing Union law (see Art. 51(5) of the Charter of Fundamental Rights). It can be argued that this includes situations in which Member States implement Council decisions (formerly joint actions) setting up EU military operations, as such decisions are legal (albeit not legislative) acts under EU law.[114]

to the ECHR have to accept the jurisdiction of the European Court of Human Rights (ECtHR), including in relation to complaints by individuals, and the ECtHR issues binding judgments.

111 See more extensively Naert, *supra* note 2, pp. 397-408, 418-419 and 646-653.

112 Most recently published in *OJ C* 326, 26 October 2012, p. 391.

113 See especially Joined Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council and Commission*, 3 September 2008, §§ 301-309.

114 I will not enter into further details here on the precise scope of "implementing Union law" nor on the question whether this scope of application of the Charter is identical to that developed in the case-law of the ECJ for EU human rights law prior to the Charter

Consequently, the EU has extensive treaty based human rights obligations and to a great extent these are the same as those of its Member States and include notably the ECHR and the Charter of Fundamental Rights of the European Union. This limits interoperability challenges in this respect and also means that in terms of substantive obligations, it is of relatively little importance whether conduct relating to EU military operations is attributable to the Union and/or to one or more Member States. In relation to available remedies, the attribution question remains important but once the EU will have acceded to the ECHR this will be much less the case (see above).

This also means that the challenges that arise for the EU in relation to human rights in its peace operations essentially concern the same issues that also vex States,[115] as well as the question of attribution (see very briefly section IV above on the latter).

2. The EU's Accession to the ECHR

Article 6(2) TEU provides for the EU's accession to the ECHR.[116] The possibility of this accession has also been inserted in the ECHR by Protocol 14 thereto.[117] This accession is currently under negotiation.[118] As the EU is

and thereafter under Article 6(3) TEU.

115 Nevertheless, some additional questions arise. For instance, given that, according to the prevailing view, international organizations only exercise 'functional' jurisdiction, the extraterritoriality debate might be less relevant for international organizations. Interestingly, in the context of the negotiations on the EU's accession to the ECHR, the *Draft Explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms* (Council of Europe doc. 47+1(2013)002, 8 January 2013, http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents/47_1(2013)002_Draft_Explanatory_report_rev_EN.pdf), p. 6, states that: "an additional interpretation clause which clarifies how the term "everyone within their jurisdiction" in Article 1 of the Convention will apply to the EU. As jurisdiction under Article 1 of the Convention is primarily territorial, this interpretation clause clarifies that the EU is required to secure the rights of persons within the territories of the member States of the EU to which the TEU and the TFEU apply. Nevertheless, the Court has recognized that in certain exceptional circumstances, a High Contracting Party may exercise jurisdiction outside its territorial borders […]. Accordingly, where the Convention might apply to persons outside the territory to which the Treaties apply, the clause clarifies that they should be regarded as being within the jurisdiction of the EU only where they would be within the jurisdiction of a High Contracting Party which is a state had the alleged violation been attributable to that High Contracting Party"). Also, the question arises whether human rights obligations under EU law (may) have a distinct scope of application. See Naert, *supra* note 2, pp. 405-406 and especially pp. 649-651.

116 See also Protocol No 5 to the Treaty of Lisbon.

117 See Article 17 of Protocol No. 14 to the ECHR (Strasbourg, 13 May 2004, *C.E.T.S.* No. 194, entered into force on 1 June 2010), which inserted a new paragraph in article 59 ECHR stipulating that "[t]he European Union may accede to this Convention".

118 The negotiations started on 7 July 2010. See http://hub.coe.int/en/web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention?dynLink=true&layoutId=22&dlg

already bound to the ECHR in substance (via Article 6 TEU, see above) this accession will mainly have an impact on remedies (see briefly section IV above).[119]

Furthermore, beyond the impact on the EU, it will constitute an important precedent for an international organization to become a party to a key human rights treaty.[120]

3. EU Policy and Practice on Human Rights in Its Operations

As indicated above, the EU and its Member States accept that if EU-led forces become a party to an armed conflict, IHL will fully apply to them but given that this scenario will be rather exceptional, EU policy is that IHL does not necessarily apply in all EU military operations nor is it necessarily considered the most appropriate standard as a matter of policy in all EU military operations.

When IHL does not apply, the EU primarily looks towards human rights law as the appropriate standard for the conduct for EU military operations (that is not to say that human rights law is not relevant when IHL does apply; see section V.2 above).

However, the controversies regarding the applicability of human rights law *de iure* referred to above are 'imported' into the EU framework and potentially affect the application of human rights in EU military operations. While divergences are limited as Member States broadly have the same European and international human rights obligations, Member States' obligations are not fully identical and they may interpret some of their shared obligations differently.

In any event, at least as a matter of *policy* human rights provide significant guidance in EU military operations and in practice, EU operational planning and ROE take into account internationally recognised human rights standards.[121]

roupId=10226&fromArticleId= and http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Working_documents_en.asp for an overview. This forthcoming accession has been extensively discussed in doctrine.

[119] It will also change the nature of the obligation: the EU will be bound by the ECHR itself under international law, in addition to being indirectly bound to the ECHR via the TEU.

[120] The EU is already a party to the Convention on the Rights of Persons with Disabilities (New York, 13 December 2006; see Council Decision 2010/48/EC of 26 November 2009, *OJ L* 23, 27 January 2010, p. 35) but this does not have the same significance.

[121] Compare generally Sari & Wessel (eds.), *supra* note 12, and H. Hazelzet, 'Human Rights Aspects of EU Crisis Management Operations: from Nuisance to Necessity', Vol. 13 *International Peacekeeping* 2006, pp. 564-581. For two case-studies, see W. Troszczynska - van Genderen, *Human Rights Challenges in EU Civilian Crisis Management* (Paris, EU Institute for Security Studies, 2010, Occasional paper 84), http://www.iss.europa.eu/uploads/media/OcassionalPaper84.pdf. The EU has *inter*

This is explicitly reflected in legal instruments relating to some CSDP operations (since the operational planning documents and ROE are not in the public domain, these are the main public sources that support the above analysis). E.g., EULEX Kosovo (a civilian mission) is to "ensure that all its activities respect international standards concerning human rights and gender mainstreaming".[122] Also, suspected pirates or armed robbers at sea captured by the EU's counter-piracy operation Atalanta[123] may not be transferred to a third State "unless the conditions for the transfer have been agreed with that third State in a manner consistent with relevant international law, notably international law on human rights, in order to guarantee in particular that no one shall be subjected to the death penalty, to torture or to any cruel, inhuman or degrading treatment".[124] The latter provision has led to the conclusion of transfer agreements between the EU and third States in the region (Kenya,[125] the Seychelles[126] and Mauritius[127]) and arrangements with third States participating in Atalanta (e.g. Croatia[128] and Montenegro[129]), which contain substantial provisions aiming to ensure respect for human rights.[130]

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alia developed a number of documents on mainstreaming human rights (and gender) into the CSDP; see e.g. the compilation available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/hr/news144.pdf (dated 2008) and, for more recent information, EU Council Doc. 17138/1/10 of 30 November 2010, *Lessons and best practices of mainstreaming human rights and gender into CSDP military operations and civilian missions*.

122 Article 3(i) of Council Joint Action 2008/124/CFSP of 4 February 2008, *OJ L 42, 16 February* 2008, p. *92* (this act has subsequently been amended on several occasions*)*.

123 On this operation, see generally http://www.consilium.europa.eu/eeas/security-defence/eu-operations/eunavfor-somalia?lang=en and http://eunavfor.eu and Naert *supra* note 2, pp. 179-191.

124 Article 12 Council Joint Action 2008/851/CFSP of 10 November 2008, *OJ L 301, 12 November 2008, p. 33 (corrigendum OJ L* 253, 25 September 2009, p. 18) (this act has subsequently been amended on several occasions*)*.

125 *OJ L 79, 25 March 2009, p. 49 (no longer in force)*

126 *OJ L 315, 2 December 2009, p. 37.*

127 *OJ L 254, 30 September 2011, p. 3.*

128 See Article 3 of, and the Annex to, the Agreement between the European Union and the Republic of Croatia on the participation of the Republic of Croatia in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta), *OJ L* 202, 4 August 2009, p. 84.

129 See Article 3 of, and the Annex to, the Agreement between the European Union and Montenegro on the participation of Montenegro in the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (Operation Atalanta), *OJ L* 88, 8 April 2010, p. 3.

130 For a discussion of some relevant aspects, see Naert & Van Hegelsom, *supra* note 9, pp. 2-10. See also *supra* note 66. *On the transfer of detainees more generally, see also F. Naert,* 'Setting the Scene: Transfers and Humanitarian Concerns - An EU Perspective' and 'Ways Forward. How to Operationalise the Legal Obligations?', in H. Sagon *et al*.

VII. Final Remarks

The EU attaches significant importance to respect for international law, including IHL, and human rights in its external relations. This requirement is enshrined in its constitutive treaties and reflected in its practice in relation to the planning, decision making and conduct of military operations.

The EU and its Member States accept that if EU-led forces become a party to an armed conflict, IHL will fully apply to them. In that case, the EU is arguably bound by customary international humanitarian law, while its Member States also remain bound by their IHL treaty obligations. However, while EU military operations may involve (high intensity) combat that would entail the applicability of IHL, this has not been the case so far, and will most likely remain the exception rather than the rule. Consequently, EU policy is that IHL does not necessarily apply in all EU military operations nor is it necessarily considered the most appropriate standard as a matter of policy in all EU military operations.

Rather, in most operations the EU looks to human rights law as the appropriate standard for conduct in its military operations. The EU has extensive treaty based human rights obligations distinct from (but largely identical to) those of its Member States. However, as a matter of law these are largely subject to the same controversies that exist in relation to States. Nevertheless, at least as a matter of policy human rights provide significant guidance in EU military operations and in practice, EU operational planning documents and ROE take into account human rights standards.

The IHL and human rights law obligations of the EU and its Member States in EU military operations are to a significant extent similar, although not fully identical. This limits legal interoperability issues. Where such issues nonetheless arise, the EU has a number of tools to deal with them. So far, these appear to have been adequate.

(eds.), *Transfers of Persons in Situations of Armed Conflict. 9th Bruges Colloquium, 16-17 October 2008 /...* (Bruges, College of Europe & ICRC, 2009), respectively pp. 18-26 and pp. 107-112 and the other contributions in this publication (*Collegium* No. 39, http://www.coleurope.eu/content/publications/pdf/Collegium39.pdf).